

Department of Defense

American Indian and Alaska Native Policy

PREAMBLE

These principles establish the Department of Defense's (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as "tribes"¹)(a). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes² (b), DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect (c&d) protected tribal resources, tribal rights, or Indian lands³ (e).

¹ As defined by most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in Federal Register pursuant to Section 104 of the Federally Recognized Indian Tribe List Act.

² This policy is not intended to, and does not, grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

³ Definition of Key Terms:

- **Protected Tribal Resources:** Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by, or reserved by or for, Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources.
- **Tribal Rights:** Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.
- **Indian Lands (f):** Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

(a) This policy governs Department interactions with federally recognized tribes only; it does not govern interaction with unrecognized tribes, state-recognized tribes, Alaska Native village corporations or regional corporations, or Native Hawaiians. [In Alaska, as a practical matter, the Department may need to discuss proposed actions with Alaska Native village or regional corporations simply because these corporate entities own and manage much of the land in Alaska. In such cases, the relationship between the Department and the corporate entity is a business relationship between the government and a private party, not a government-to-government relationship.]

(b) This policy neither enlarges nor diminishes the Department's legal obligations with respect to federally recognized tribes, nor does the policy provide an independent cause of action upon which the Department may be sued.

(c) The phrase "may have the potential to significantly affect," which appears throughout the policy, establishes the general threshold or "trigger" for consultation to be used unless a statute or other legal obligation specifically establishes a lower threshold for consultation. It is expected that DoD personnel will informally contact interested tribes whenever there is any real possibility

that tribal interests may be affected by proposed DoD actions, but that continued, more formal consultation will be necessary only when it appears, from initial discussions with a tribe, that tribal interests will be *significantly* affected by the proposed action. In other words, the policy anticipates a two-step process designed first, to overcome the fact that, as non-Indians, we may not always recognize the effect our actions may have on tribal interests unless we ask, and second, to permit DoD to proceed without the need for further consultation unless potentially *significant* consequences are identified during this initial discussion. [Note: The word "significantly" is used in this policy in its ordinary dictionary sense; i.e., as a synonym for "material" or "important." It should not be interpreted in the NEPA or Council on Environmental Quality NEPA Regulations sense, as that would set a higher threshold for consultation than was intended.]

(d) There is no obligation to consult with tribes in advance of a proposal that "may have the potential to significantly affect" tribal interests. In other words, the obligation to consult with tribes under this policy is event- or proposal-driven. Nonetheless, as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a tribe and wishes to establish a stand-by protocol for consultation absent the pressures associated with a particular proposal.

(e) The phrase "protected tribal resources, tribal rights, or Indian lands," which appears throughout the policy, works in conjunction with the "may have the potential to significantly affect" trigger to determine when DoD must consult with tribes. Generally speaking, DoD must consult with tribes only when its proposed actions may have the potential to significantly affect Indian lands, treaty rights, or other tribal interests protected by statute, regulation, or executive order. [Note: Some statutes may establish a lower threshold for consultation than the default threshold established in this policy (see, e.g., 16 U.S.C. 470a(d)(6)(B)); in such cases, the Department must consult with tribes in accordance with the statutory requirements.] [Note also, that individual rural residents of Alaska, including both Natives and non-Natives, generally have a right to engage in nonwasteful subsistence uses of fish, wildlife, and other wild, renewable resources on public lands in Alaska. While this right is not a *tribal* right *per se*, installations nonetheless may find it both convenient and beneficial to consult with the appropriate Alaska Native entity whenever a proposed DoD action may have the potential to adversely affect the subsistence activities of several members of the same village or tribe.]

(f) With respect to Alaska, the term "Indian Lands" does not include lands held by Alaska Native Corporations or lands conveyed in fee to an Indian Reorganization Act entity or traditional village council; the term may include village-owned townsite lands (depending on the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community), and individual Native townsite lots and Native allotments (so long as these properties remain in either restricted fee or trust allotment form).

I. TRUST RESPONSIBILITIES

DoD will meet its responsibilities to tribes. These responsibilities are derived from:

- Federal trust doctrine **(g)** (i.e., the trust obligation of the United States government to the tribes);
- Treaties, Executive Orders, Agreements, Statutes, and other obligations between the United States government and tribes, to include:
 1. Federal statutes (e.g., Native American Graves Protection and Repatriation Act, American Indian Religious Freedom Act, National Environmental Policy Act, National Historic Preservation Act, Alaska National Interest Lands Conservation Act, Alaskan Native Claims Settlement Act, and Archeological Resources Protection Act); and
 2. Other federal policies (e.g., Executive Order 12898, "Environmental Justice"; Executive Order 13007, "Indian Sacred Sites"; Executive Order 13021 "Tribal Colleges and Universities"; "Presidential Memorandum: Government to Government Relations with Native American Tribal Governments," dated 29 April 1994; and Executive Order 13084, "Consultation and Coordination with Indian Tribal Governments").

DoD will annually review the status of relations with tribes to ensure that DoD is:

- Fulfilling its federal responsibilities; and
- Addressing tribal concerns related to protected tribal resources, tribal rights, or Indian lands.

(g) Under the federal trust doctrine, the United States--and individual agencies of the federal government--owe a fiduciary duty to Indian tribes. The nature of that duty depends on the underlying substantive laws (i.e., treaties, statutes, agreements) creating the duty. Where agency actions may affect Indian lands or off-reservation treaty rights, the trust duty includes a substantive duty to protect these lands and treaty rights "to the fullest extent possible." Otherwise, unless the law imposes a specific duty on the federal government with respect to Indians, the trust responsibility may be discharged by the agency's compliance with general statutes and regulations not specifically aimed at protecting Indian tribes.

II. GOVERNMENT TO GOVERNMENT RELATIONS

Build stable and enduring relationships with tribes by:

- Communicating with tribes on a government-to-government basis **(h)** in recognition of their sovereignty;
- Requiring meaningful communication addressing tribal concerns between tribes and military installations at both the tribal leadership-to-installation commander and the tribal staff-to-installation staff levels **(i)**;
- Establishing a senior level tribal liaison in the Office of the Secretary of Defense **(j)** and other appropriate points of contact within DoD to ensure that tribal inquiries are channeled to appropriate officials within DoD and responded to in a timely manner;
- Providing, to the extent permitted by DoD authorities and procedures, information concerning opportunities available to tribes to: 1) compete for contracts, subcontracts, and grants, and participate in cooperative agreements; 2) benefit from education and training; 3) obtain employment; and 4) obtain surplus equipment and property;
- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made **(k)**;
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests **(l)** for information from tribes.

(h) Indian tribes have been called "domestic dependent nations"--i.e., nations within a nation. As such, consultation with tribes on a "government-to-government basis" requires a high degree of formality (see attached sample framework for consultation). Unless--or until--a tribal-specific protocol for consultation has been developed, formal contact with a tribe should be made by the installation commander, and should be directed to the tribe's senior elected official, usually referred to as the tribal chair, governor, or president.

(i) Although communication with tribes on a government-to-government basis demands attention--at least initially--at a relatively senior level of command, the goal should be to develop mutually acceptable protocols or procedures that will allow most day-to-day liaison and work with interested tribes to be accomplished on a staff-to-staff basis (see attached protocol template). Senior commanders and tribal leaders should be kept apprised of this day-to-day interaction, but--once these protocols are in place--need act personally and directly only when requested to do so by the other party.

(j) Although the Deputy Under Secretary of Defense for Environmental Security will provide tribes with a senior-level liaison to ensure tribal inquiries are promptly addressed, DoD officials at all levels of command should strive to make it easier for tribes to receive timely answers to the questions they may have concerning DoD activities that may affect them. One way to

accomplish this at the installation level could be to designate and announce a principal point-of-contact for the receipt of tribal inquiries.

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes *before* decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

(l) Keep in mind that many tribes have relatively few enrolled members and only a limited staff to respond to your requests. This being the case, coordinate your requests for information with other federal agencies whenever doing so may reduce the administrative burden on the affected tribe.

III. CONSULTATION

Fully integrate (down to staff officers at the installation level) the principle and practice of meaningful consultation and communication with tribes by:

- Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereign authority **(m)**;
 - Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to **(n)** by the particular tribe and DoD, including necessary dispute resolution processes;
 - Providing timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands;
 - Consulting in good faith throughout the decision-making process **(o)**; and
 - Developing and maintaining effective communication, coordination, and cooperation with tribes, especially at the tribal leadership-to-installation commander level and the tribal staff-to-installation staff levels.
-

(m) What constitutes "due consideration...consistent with tribal sovereignty" depends, in part, on the underlying law that dictates that consultation take place. "Consultation" can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent to a proposed action (the absence of which may be enough to stop that action from proceeding). The attached table summarizes the specific legal obligations owed tribes under the trust doctrine and various statutes. In general, two principles should be kept in mind. One, tribes are not just another interested party; where tribal interests may be significantly affected, tribes must be regarded as separate from the general public for the purposes of consultation. Second, in most cases, consultation should include an invitation to potentially affected tribes to provide information to DoD concerning actions that may significantly affect tribal interests; that information should be given special consideration. In some instances, e.g., where Indian lands or treaty rights may be significantly and adversely affected, tribal rights may take precedence and dictate that DoD protect these rights to the fullest extent possible.

(n) There are over 570 federally recognized Indian tribes, each with its own distinctive cultural identity. Just as is true with foreign nations, a "one-size-fits-all" prescription for consultation with Indian tribes is neither appropriate nor possible. Instead, installations should expect to have to negotiate a mutually agreeable protocol with each separate tribe with which it must consult. While certain elements can be expected be a part of any such protocol (see attached protocol template), installations should be mindful of the fact that tribes all have different ways of controlling property, harvesting natural resources, revering the environment, and even conducting consultations.

(o) Keep it in mind that the consultation trigger contemplates a two-step process. Consultation need continue throughout the decision-making process only for those proposals that have the potential to *significantly* affect tribal interests.

IV. NATURAL AND CULTURAL RESOURCES PROTECTION

Recognize and respect the significance tribes ascribe to certain natural resources and properties of traditional or customary religious or cultural importance by:

- Undertaking DoD actions and managing DoD lands consistent with the conservation of protected tribal resources and in recognition of Indian treaty rights to fish, hunt, and gather resources at both on- and off-reservation locations **(p)**;
- Enhancing, to the extent permitted by law, tribal capabilities to effectively protect and manage natural and cultural tribal trust resources whenever DoD acts to carry out a program that may have the potential to significantly affect those tribal trust resources **(q)**;
- Accommodating, to the extent practicable and consistent with military training, security, and readiness requirements, tribal member access to sacred and off-reservation treaty fishing, hunting, and gathering sites located on military installations; and
- Developing tribal specific protocols to protect **(r)**, to the maximum extent practicable and consistent with the Freedom of Information Act, Privacy Act, National Historic Preservation Act, and Archeological Resources Protection Act, tribal information regarding protected tribal resources that has been disclosed to, or collected by, the DoD.

(p) Fulfillment of the trust responsibility demands that federal agencies protect the lands and habitats that support the resources upon which the meaningful exercise of tribal hunting, fishing, and gathering rights depend. This includes actions on non-Indian-owned lands (including DoD installations) that may affect Indian lands or off-reservation treaty rights (such as reserved rights to hunt, fish, or gather on treaty-ceded lands or "usual and accustomed" grounds and stations). In addition, in Alaska, DoD must endeavor to protect the continued viability of all wild, renewable resources in order to minimize, to the extent possible, the adverse effects of its actions on rural residents who depend upon subsistence uses of such renewable resources.

(q) Where a proposed DoD action may have the potential to significantly affect tribal *trust* resources (i.e., Indian lands or treaty rights to certain resources) or DoD has been given express statutory authority (e.g., §8050 of the Department of Defense appropriations Act of FY 1999), DoD may have limited authority to help develop and enhance the affected tribe's capacity to better manage these resources. This, however, is an area fraught with fiscal law pitfalls; consequently, installations are advised to consult with legal counsel before committing to expend appropriated funds for this purpose.

(r) Presently, legal authority to protect tribal information concerning sacred sites is very limited. Section 9 of the Archeological Resources Protection Act (16 U.S.C. § 470hh) and Section 304 of the National Historic Preservation Act (16 U.S.C. § 470w-3) may provide some protection from a request for such information, but may not be enough to guarantee confidentiality in the face of a Freedom of Information Act request for disclosure--especially the NHPA provision. A written consultation agreement with a tribe may be appropriate in some circumstances and

permit an installation to withhold disclosure under FOIA Exemption 5, but even this tactic may prove to be ineffective. As a consequence, installations should be careful not overstate their ability to keep sensitive tribal information confidential.

DUTY	WHEN THE DUTY APPLIES
<p>Trust Responsibility</p> <ul style="list-style-type: none"> • Protect “to the highest degree of fiduciary standards” trust lands and water and land habitats that support meaningful exercise of off-reservation hunting, fishing, and gathering rights • Where trust responsibility applies, Indian interests cannot be subordinated to interests of the DoD absent overriding legal authority to do so 	<ul style="list-style-type: none"> • Proposed action may affect* <u>trust lands</u> -trust lands are (1) tribally owned lands held in trust by the federal government; and (2) allotted lands owned by individual Indians but held in trust by the federal government; and (3) restricted fee allotments • Proposed action may affect* <u>off reservation treaty rights</u> -off-reservation treaty rights are those use and occupancy rights reserved for Indians in a treaty, statute, or E.O. establishing a reservation <p>* even actions on DoD or other non-Indian-owned lands may affect trust land or off-reservation treaty rights and be conditional by the trust responsibility</p>
<p>Obtain Consent from Indian Tribe</p>	<ul style="list-style-type: none"> • Prior to issuing an ARPA permit on Indian lands 16 USC 470cc (g)(2) [ARPA §4] • When determining disposition of archeological items removed from Indian lands 16 USC 470dd (2) [ARPA §5] • Before removing Native American human remains or cultural items from tribal lands 25 USC 3002(c)(2) [NAGPRA §3]
<p>Consult with Indian Tribe</p>	<ul style="list-style-type: none"> • Prior to completing inventories of Native American human remains and associated funerary objects in an agency’s possession 25 USC 3003 (b)(1)(A) [NAGPRA §5] • Determining the cultural affiliation of unassociated funerary objects, sacred objects, and objects of cultural patrimony 25 USC 3004(b)(1)(B) [NAGPRA §6] • Determining how to return cultural items or human remains 25 USC 3005(a)(3) [NAGPRA §7] • Clarifying agency’s NHPA responsibilities where Indian tribe

DUTY	WHEN THE DUTY APPLIES
<p>Consult with Indian Tribe, continued</p> <ul style="list-style-type: none"> National Environmental Policy Act and CEQ Regulations 	<p>or Native Hawaiian organizations attaches religious cultural significance to register-eligible site 16 USC 470a(d)(6)(B) [NHPA]</p> <ul style="list-style-type: none"> When agency's preservation work may affect tribal concerns 16 USC 470h-2 (a)(2)(D) [NHPA] Deciding how to deal with adverse effects of federal undertakings on register-eligible properties 16 USC 470h-2 (a)(2)(E)(ii) [NHPA] During development of regulatory policies that significantly or uniquely affect Indian communities E.O. 13084, 14 May 1998, Sec. 3 Before taking actions that will affect federally recognized tribal governments Executive Memorandum, 29 April 1994, Section (b) Dealing with access, use, and protection of sacred sites E.O. 13007, 24 May 96, Section 2(b)(iii) Invite affected Indian tribe to participate in scoping 40 CFR 1501.7 (a)(1) Invite comments on draft EIS 40 CFR 1503.1 (a)(2)(ii) May request Indian tribe to become a cooperating agency when proposal may affect trust lands or treaty rights 40 CFR 1503.5
<p>Notify Indian Tribes</p>	<ul style="list-style-type: none"> Prior to issuing an ARPA permit for work that may harm a religious cultural site 16 USC 470cc (c) [ARPA §4] After completing NAGPRA-required inventories of Native American human remains and associated funerary objects 25 USC 3003(d) [NAGPRA §5] When "summarizing" inventory of unassociated funerary objects, sacred objects, and objects of cultural patrimony

DUTY	WHEN THE DUTY APPLIES
<p>Notify, continued</p> <ul style="list-style-type: none"> National Environmental Policy Act and CEQ Regulations 	<p>25 USC 3004(a) [NAGPRA §6]</p> <ul style="list-style-type: none"> Prior to taking an action that may restrict access to or use of or affect the physical integrity of sacred sites E.O. 13007, 24 May 96, Section 2(a) Provide notice of hearings, meetings, and availability of documents when proposal may affect trust lands 40 CFR 1506.6 (b)(3)(ii), or treaty rights

TRIBAL CONSULTATION PROTOCOL

Tribal consultation means the formal, mutually agreed upon process by which an installation commander, or higher level official, communicates and coordinates, on a government-to-government basis, with tribal governments. Tribal consultation is intended to assure meaningful tribal participation in planning and decisionmaking processes for actions with the potential to effect protected tribal resources, tribal rights or Indian lands. The following is a generic ten-step protocol for consulting with a Federally recognized tribe.

I. Consultation Planning

1. Identify tribes with whom consultation relationships should be established. These should, at a minimum, include tribes with cultural, religious or historical connection and tribes affected by military activities.
2. Establish a consultation plan that identifies issues for consultation; necessary participants; anticipated consultation efforts and time frames; and, relevant tribal governmental structures, protocols and cultural etiquette.

II. Initiating Consultation

3. Initiate consultation with a certified letter from the installation commander to the head of the tribal government. The letter should identify participating installation officials, suggest issues for consultation and propose a schedule. It should request identification of tribal representatives and invite the tribe to suggest issues, protocols and alternative time and place.
4. Provide reasonable time for response that accommodates both mission need and tribal cultural and governmental practices. Lack of response does not indicate lack of interest. A letter without follow up action is insufficient.
5. Furnish tribe with all information necessary for the tribe to participate meaningfully in the consultation. This should include relevant points of contact, general information on base operations and military training, and specific information regarding issues for consultation.
6. Follow up with the tribe to finalize issues, schedules and protocols for conducting the consultation. This may be done by staff level officials. Provide additional information if requested.

III. Conducting Consultation

7. Conduct tribal consultation using protocols respectful of the government-to-government relationship and tribal culture. Initial consultation should be conducted face-to-face and follow a mutually agreed upon agenda that identifies consultation issues, possible outcomes, and the need, if any, for follow-on consultation. Do not record consultation meetings without prior tribal consent.

8. Document the outcome of the consultation. Provide a draft to the consulting tribe and solicit their input prior to finalizing.

IV. After Action

9. Resolve outstanding issues or disagreements through follow on consultation if necessary. Consider alternate means for reaching resolution if the consulting parties are unable to do so.

10. Consider annual government-to-government consultation meetings with tribes to maintain ongoing relationships and provide relevant information on upcoming mission activities.